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Federal Communications Commission
Office of Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Implementation of Infrastructure
Sharing Provisions in the
Telecommunications Act of 1996

CC Docket No. 96-237

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REPLY COMMENTS OF GTE SERVICE CORPORATION

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January 3, 1997

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SUMMARY

The record clearly indicates that the Commission should provide general guidance to LECs seeking to enter infrastructure sharing arrangements rather than adopting detailed rules. Broad guidelines will allow carriers to tailor agreements to meet their unique needs and capabilities and therefore will best implement Congress's objective of increasing the availability of advanced services to customers in rural areas. Accordingly, GTE recommends that the Commission's rules to implement Sections 259(a), 259(b), and 259(d) merely repeat the statutory language, and that the Order provide additional interpretations of the statute to assist parties in negotiating agreements. (The Commission apparently is not authorized to adopt rules to implement Section 259(c), and no such rules are necessary in any event, since the rules adopted pursuant to Section 251(c)(5) already require disclosure of the information contemplated by Section 259(c).)

Specifically, with respect to Section 259(a), the Order should state that the Section 259(a) sharing obligation does not encompass resale of services. By definition, services are not included within "public switched network infrastructure, technology, information, and telecommunications facilities and functions." A qualifying LEC desiring to resell the service of a providing LEC may proceed under Section 251(c)(4). The Order also should note that providing LECs are not required to build new facilities or expand existing ones solely to accommodate sharing requests under Section 259. Such an obligation would be tantamount to mandatory joint network planning, which is not required by the Act. In addition, the Commission should acknowledge that infrastructure sharing under Section 259 is independent of a carrier's obligations under Sections 251 and 252. Contrary to claims by MCI, the terms and rates in agreements reached under Sections 251 and 252 do not constitute a baseline for Section 259 agreements. The infrastructure sharing and interconnection provisions serve two

different purposes, and there is no basis for tying them together in a manner that Congress did not intend. Finally, the Commission should state that providing LECs are not required to license proprietary technology or provide marketing information to qualifying LECs. As the record makes clear, providing LECs may have only limited rights with respect to proprietary technology; moreover, mandatory disclosure of marketing information would serve no purpose cognizable under Section 259 and would undermine the cooperative nature of infrastructure sharing arrangements.

With respect to Section 259(b), the Order should state that:

- Section 259 agreements should be filed with the appropriate state commissions and disputes should be taken to either the state commission or the FCC, based on the interstate/intrastate nature of the issue.

- The economic reasonableness of an arrangement will be determined based on the cost-effectiveness to the providing LEC, and Section 259 imposes no particular pricing standard on infrastructure sharing arrangements.

- Providing LECs are not subject to nondiscrimination obligations.

- Providing LECs may terminate infrastructure sharing agreements in the event that the qualifying LEC and the providing LEC are competing in the same service area (regardless of which carrier is the incumbent LEC) pursuant to terms negotiated by the parties.

- Contrary to MCI's claims, Section 259 does not include an evaluation process for infrastructure sharing agreements.

Finally, with respect to Section 259(d), the Commission should establish a presumption that "rural telephone companies" meet the definition of qualifying carriers. However, it should permit other individual operating entities to demonstrate that they lack sufficient economies of scope or scale to bring advanced services to rural customers, even if such entities do not meet the definition of "rural telephone company" and are affiliated with a larger holding company. There is no support in the statute for arbitrarily limiting qualifying carriers nor would such an interpretation advance Congress's goal of maximizing the availability of advanced services in rural areas.

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REPLY COMMENTS OF GTE SERVICE CORPORATION

GTE Service Corporation ("GTE"), on behalf of its affiliated domestic telephone operating companies, hereby files its Reply in the above-captioned docket.[1] There is nearly unanimous agreement among the commenters that the Commission should adopt only general guidelines governing infrastructure sharing; MCI is the only party that believes that expansive and intrusive rules are necessary. As discussed herein, MCI's belief that Congress intended Section 259 sharing agreements to be constrained by detailed regulations is not supported by either the language of the statute or the legislative history. Congress intended Section 259 to encourage continuation of the type of sharing arrangements that are already in place and to bring advanced services to rural areas. To facilitate such agreements, the Commission should issue general guidelines, in accordance with the recommendations set forth below, which allow the parties to tailor each arrangement to meet the unique needs of the particular providing and qualifying carriers.

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[1] Notice of Proposed Rulemaking, CC Docket No. 96-237 (Nov. 22, 1996)("NPRM").

I. THE COMMISSION SHOULD NOT DEFINE THE FACILITIES THAT ARE SUBJECT TO SHARING AND SHOULD CLARIFY THAT SECTION 259 DOES NOT REQUIRE PROVIDING LECS TO BUILD FACILITIES.

The Commission should not try to enumerate all of the facilities included within "public switched network infrastructure, technology, information, and telecommunications facilities and functions."[2] Defining exactly what facilities are eligible to be shared will by necessity result in a static definition which would not adapt to rapidly changing technology. As numerous commenters suggest, the Commission instead should allow the negotiating parties to determine what infrastructure will be shared, particularly since there is no evidence of past disputes regarding shared infrastructure.[3] A qualifying LEC which believes that a providing LEC is not properly interpreting the statute always has recourse to the appropriate state commission or the Commission's complaint process.

The Commission also should clarify that the infrastructure to be shared under Section 259(a) only encompasses existing facilities. Several parties concurred with GTE that providing LECs are not required to build new facilities to accommodate qualifying LECs where the providing LEC does not intend to use those facilities.[4] Sharing of infrastructure means that both the qualifying and

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[2] Comments of GTE Service Corporation, CC Docket No. 96-237, at 3-4 (filed Dec. 20, 1996)("GTE Comments").

[3] BellSouth, NYNEX, Pacific Telesis, Southwestern Bell, and USTA all support this position. *See* BellSouth Comments, CC Docket No. 96-237, at 9 (filed Dec. 20, 1996)("BellSouth Comments"); NYNEX Comments, CC Docket No. 96-237, at 12 (filed Dec. 20, 1996)("NYNEX Comments"); Comments of Pacific Telesis Group, CC Docket No. 96-237, at 8 (filed Dec. 20, 1996)("PacTel Comments"); Comments of Southwestern Bell Telephone Company, CC Docket No. 96-237, at 4 (filed Dec. 20, 1996)("Southwestern Bell Comments"); Comments of the United States Telephone Association, CC Docket No. 96-237, at 4 (filed Dec. 20, 1996)("USTA Comments").

[4] Comments of ALLTEL Telephone Services Corporation, CC Docket No. 96-237, at 4 (filed Dec. 20, 1996)("ALLTEL Comments"); BellSouth Comments at 11; (continued ..)

providing LEC will make use of the facilities. The Rural Telephone Coalition argues that as long as the providing LEC is fully compensated for its expenditures, it should be required to increase capacity to accommodate a qualifying LEC. This is not what Section 259 contemplates. As USTA explained, a requirement to purchase, install, or upgrade facilities would effectively constitute mandatory joint network planning, contrary to Section 259(b)(2). In addition, the diversion of labor and other resources to fulfilling the request could undermine the providing LEC's ability to provide service to its own customers.[5] Therefore, in its guidelines, the Commission should state that LECs are not required to install new facilities or upgrade existing ones to accommodate qualifying LECs.

II. IN DEVELOPING ITS REGULATIONS, THE COMMISSION MUST TAKE INTO ACCOUNT THAT SECTION 259 WAS INTENDED TO PROMOTE UNIVERSAL SERVICE.

With the exception of MCI, all commenters generally agreed that the standards in Section 251 are different from those in Section 259.[6] Section 251 envisions interconnection agreements between competing carriers while Section 259 promotes sharing between non-competing carriers. "[T]he sharing arrangements under Section 259 are distinct and separate from the required provision of services under Section 251 and are only available in circumstances where the requesting qualifying carrier is not competing with the ILEC."[7]

(..continued)
PacTel Comments at 13.

[5] USTA Comments 15-16.

[6] *See, e.g.*, ALLTEL Comments at 3-4; NYNEX Comments at 3-11; USTA Comments at 6-7.

[7] Comments of Sprint Corporation, CC Docket No. 96-237, at 3 (filed Dec. 20, 1996)("Sprint Comments").

For this reason, the Commission should reject the National Cable Television Association's claim that all network features and functions available to qualifying carriers under Section 259 must be made available to requesting CLECs on the same terms under Section 251.[8] Because Section 259 arrangements are between non-competing carriers, a providing LEC may be willing to make infrastructure available to a qualifying LEC which the providing LEC does not have to make available to a competing LEC under Section 251. The purpose of Section 259 is to bring advanced services to the customers of qualifying LECs, not to expand upon or circumvent Section 251.

MCI is likewise wrong in claiming that "the terms, conditions, and rights afforded a carrier under Section 251 should serve as a minimal baseline for what should be made available under Section 259,"[9] and that "Congress intended the Commission to implement rules permitting information [sic] on terms more favorable than they would receive, either under 251, or under any agreement among non-competing LECs prior to the passage of the 1996 Act."[10] There is no support for this proposition in the statute. As explained in its comments, USTA developed infrastructure sharing legislation in order "to codify that, even with the entry of local competitors, these co-carrier relationships could, and should, continue in order to advance the universal service objectives of the Act."[11] Grafting the suffocating details of regulation under Section 251 onto Section 259 –

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[8] Comments of the National Cable Television Association, Inc., CC Docket No. 96-237, at 5-6 (filed Dec. 20, 1996)("NCTA Comments").

[9] Comments of MCI Telecommunications Corporation, CC Docket No. 96-237, at 4 (filed Dec. 20, 1996)("MCI Comments").

[10] *Id.* at 2-3.

[11] USTA Comments at 1-2(footnote omitted).

and then using these merely as a starting point for sharing – would assure precisely the opposite result: cooperation would be transformed into conflict, to the detriment of rural consumers.

Similarly, there is no support in the language of Section 259 or in the legislative history for the Rural Telephone Coalition's claim that Congress intended the resale of services to be included within the scope of Section 259.[12] Section 259(a) requires the sharing of public switched network infrastructure, technology, information, and telecommunications facilities and functions – not services.[13] If any qualifying carrier wishes to purchase services for resale, it may do so under Section 251 under the same terms as other carriers.

III. SECTION 259 DOES NOT REQUIRE LECS TO LICENSE PROPRIETARY TECHNOLOGY OR TO PROVIDE MARKETING INFORMATION.

There is general agreement among the commenters that providing LECs are not required to license proprietary technology or provide access to marketing information.[14] Patent licensing is not needed for infrastructure sharing, and as noted by NYNEX, Southwestern Bell, and GTE, agreements for proprietary technology often do not allow disclosure of such information to third parties.[15] In

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[12] Comments of the Rural Telephone Coalition, CC Docket No. 96-237, at 3-4 (filed Dec. 20, 1996)("RTC Comments"). *See also* Comments of Jackson Thornton and Co., CC Docket No. 96-237, at 4-5 (filed Dec. 20, 1996).

[13] BellSouth at 9-10; NYNEX at 2-4, 14; PacTel Comments at 8; Southwestern Bell Comments at 5; Sprint Comments at 3-4; USTA Comments at 5. As NYNEX points out, of course, a providing LEC may voluntarily tariff offerings that may be used to satisfy a Section 259 request. NYNEX Comments at 14.

[14] *See, e.g.*, NYNEX Comments at 12-13; USTA Comments at 25.

[15] *See* NYNEX Comments at 12-13; Southwestern Bell Comments at 6-9; GTE Comments at 6.

addition, marketing information collected by the providing LEC would in no way facilitate infrastructure sharing since it would relate only to the providing LEC's customer base. Finally, disclosure of marketing information would be anticompetitive, since it might confer an unfair advantage on a qualifying LEC that later sought to compete with the providing LEC.

IV. CONGRESS CONTEMPLATED LIMITED ROLES FOR BOTH THE STATES AND THE COMMISSION IN REGULATING INFRASTRUCTURE SHARING.

The majority of commenting parties agree with GTE that the states' role in regulating intrastate telecommunications under Section 2(b) and Section 261 (consistent with the declaration that infrastructure sharing is not common carriage) is not eliminated by Section 259.[16] Although NCTA contends that the Commission has sole authority over infrastructure sharing, they present no convincing arguments that Congress intended to preempt state authority to regulate intrastate facilities.[17] Rather, the language of Section 259, in particular subsection 259(b)(7), demonstrates that Congress expected the states to oversee the implementation of infrastructure sharing agreements under the Commission's guidelines.

V. DETAILED RULES IMPLEMENTING SECTION 259(b) ARE UNNECESSARY.

Almost every commenter concurs that carriers will be able to negotiate effective infrastructure sharing agreements without detailed Commission regulations. Therefore, the Commission should adopt rules that simply repeat the

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[16] *See, e.g.*, Comments of the Minnesota Independent Coalition, CC Docket No. 96-237, at 12-13 (filed Dec. 20, 1996)("Minnesota Comments"); PacTel Comments at 5-6; Southwestern Bell Comments at 10.

[17] NCTA Comments at 8.

statutory language and set forth in its Order broad guidelines that will encourage flexible, cooperative agreements.

A. Cost-effectiveness should be the basis for determining if an agreement is economically reasonable.

Section 259(b)(1) states that the Commission must not require LECs "to take any action that is economically unreasonable or that is contrary to the public interest." The commenting parties, with the exception of MCI, generally agree that a providing LEC is entitled to recover its costs plus a reasonable profit.[18] Because there is no evidence that parties currently involved in such arrangements are having difficulty resolving pricing issues, and because the Commission was given no authority to set detailed pricing standards, the Commission should leave the determination of prices for infrastructure sharing to the parties.[19] Any difficulties can be brought to the appropriate state commission or (if the arrangement involves interstate facilities) to the Commission's attention.

Without any support from the language or legislative history of Section 259, MCI asserts that providing LECs should be required to price shared facilities at less than or equal to the providing LEC's interim proxy prices for unbundled network elements, minus an average amount of common costs and a normal rate

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[18] *See, e.g.*, ALLTEL Comments at 4; BellSouth Comments at 11; Southwestern Bell at 11.

[19] NYNEX Comments at 13. BellSouth and USTA recommend that the pricing of shared infrastructure should result in a qualifying LEC incurring costs that allow it to charge its customers reasonably comparable prices to those charged by the providing LEC for comparable services. As explained above, GTE believes that no specific guidelines are necessary. However, if the Commission nonetheless decides to adopt guidelines, it should base them on the BellSouth/USTA recommended standard, which is reasonable and consistent with the statutory language. BellSouth Comments at 12-13; USTA Comments at 18-20.

of return.[20] This is absurd. MCI proposes this standard based on its assumption that Section 259 agreements are supposed to be more favorable to qualifying carriers than the terms available under Section 251 or under any agreement among noncompeting LECs prior to the passage of the Act.[21] However, the statute neither makes a comparison to Section 251 nor mentions agreements implemented prior to the Act. The only standard mentioned in Section 259 is that the providing LEC not be required to take any action which is economically unreasonable. Not allowing a providing LEC to recover its common costs or a return on its investment is by definition economically unreasonable and unconstitutional. Indeed, the standard MCI proposes is even less compensatory than the proxy rules which were stayed by the Eighth Circuit Court of Appeals.

The Commission should decline to adopt MCI's proposal and instead issue a rule that reflects the language of Section 259(b)(1). In addition, the Commission should state in its guidelines that providing LECs are entitled to terminate infrastructure sharing agreements if they become economically unreasonable, subject to reasonable notice.[22] However, the Commission need not adopt mandatory termination standards. No commenter submitted any evidence that detailed rules are needed to assure that reasonable termination provisions are included in sharing agreements, and such rules are inappropriate because termination arrangements probably will differ based on the type of infrastructure

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[20] MCI Comments at 9.

[21] MCI Comments at 2-3.

[22] BellSouth Comments at 12(supporting a right to withdraw from agreements that are no longer economically reasonable or in the public interest); PacTel Comments at 16(stating that a providing LEC should be able to renegotiate any agreement that becomes economically unreasonable); RTC Comments at 9-10(supporting right to renegotiate or terminate if economically unreasonable).

being shared.

B. Section 259 does not impose a nondiscrimination requirement.

Except for MCI,[23] all parties commenting on this issue agree that Section 259 imposes no nondiscrimination obligation on providing LECs.[24] MCI's assertion to the contrary is plainly incorrect. Section 259(b)(3) specifically states that infrastructure sharing should not be treated as common carriage, and requiring nondiscrimination would violate this Congressional directive.[25] Moreover, there is no need to be concerned about discrimination in any event. As several commenters noted, each sharing arrangement is unique[26] and it is highly unlikely that several qualifying LECs will be competing with each other.[27]

C. The Commission should allow providing LECs to terminate infrastructure sharing agreements in the event that the qualifying LEC and the providing LEC are competing in the same service area.

The commenters agree that when a providing LEC and a qualifying LEC begin competing in the providing LEC's exchange area, the providing LEC should have the right to terminate the infrastructure sharing arrangement under Section

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[23] MCI Comments at 8.

[24] *See, e.g.*, BellSouth Comments at 14; Comments of Frontier Corporation, CC Docket No. 96-237, at 5-6 (filed Dec. 20, 1996)("Frontier Comments"); Southwestern Bell Comments at 11-12.

[25] The requirement that an agreement be filed does not constitute a tariff or holding out of services to the public and does not imply a nondiscrimination requirement. GTE Comments at 16; *see also* USTA Comments at 21-22.

[26] Minnesota Comments at 8.

[27] Comments of U S West, Inc. CC Docket No. 96-237, at 11-12 (filed Dec. 20, 1996)("U S West Comments").

259(b)(6).[28] As GTE stated in its opening Comments, the Commission correctly concluded that Section 259(b)(6) allows providing LECs to terminate agreements in the event it discovers that the qualifying carrier is using shared facilities to offer service or access in the providing LEC's service area and that this subsection should include any telecommunications or information service offered by the providing LEC directly to consumers or any access service offered to other providers which in turn offer services to consumers.[29]

MCI and the Rural Telephone Coalition, however, state that a providing LEC should be required to continue providing shared infrastructure to a qualifying LEC even if the providing LEC begins competing in the qualifying LEC's exchange area.[30] This is inconsistent with two basic tenets of the Act.[31] First, Congress sought to encourage competition in the local exchange market. The providing LEC will be discouraged from entering a qualifying LEC's area as a CLEC if it must continue to provide shared infrastructure to that qualifying LEC. This will prevent local competition in rural areas from the most likely source – neighboring LECs. Second, discouraging neighboring LECs from entering the qualifying LEC's market will hinder the deployment of advanced services to the qualifying LEC's customers, undermining the universal service goal that lies at the heart of Section 259.

GTE agrees that a providing LEC should not be allowed to terminate

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[28] *See, e.g.*, PacTel Comments at 12-13; RTC Comments at 12-13; U S West at 5-6.

[29] GTE Comments at 18-19.

[30] MCI Comments at 11; RTC Comments at 12-13.

[31] *See* U S West Comments at 5-6.

service without reasonable notice. However, there is no reason for the Commission to mandate a specific notice period. The parties negotiating infrastructure sharing agreements will determine the conditions for termination in the same manner as the other terms of the agreement and will tailor those terms to meet the unique requirements of each LEC. In addition, there is little risk of harm to consumers because once a qualifying LEC and a providing LEC begin competing, the qualifying LEC can continue to obtain interconnection, unbundled elements and resale pursuant to Section 251 even if sharing under Section 259 is no longer available.

D. Congress did not provide for an approval process for Section 259 agreements.

MCI suggests that Section 259 agreements must be filed with the state commission or this Commission so that they can be evaluated to determine if they are more favorable to the requesting carrier than Section 252 agreements.[32] There is no basis in the statute for implementation of an evaluation process, let alone (as explained above) any requirement that Section 259 agreements be more favorable than Section 251/252 agreements. As every commenter except MCI seems to understand, Section 259 agreements will be between noncompeting carriers developing cooperative relationships. There is no need for an evaluation process; if the arrangement is satisfactory to the parties, it should be presumed to satisfy Section 259. As the Commission proposed in its NPRM, infrastructure sharing agreements simply should be filed with the appropriate state commission and take effect in accordance with their terms.[33]

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[32] MCI Comments at 11-12.

[33] NPRM, ¶ 28.

VI. THE COMMISSION SHOULD NOT ADOPT RULES TO IMPLEMENT SECTION 259(c).

Most commenters agree that the disclosure rules in Section 251(c)(5) are sufficient to ensure that qualifying carriers have access to the information necessary to make use of shared facilities (as set forth in Section 259(c)).[34] However, the Rural Telephone Coalition suggests that additional notification of planned deployment is necessary in order to allow the providing LEC to modify its plans so that infrastructure can be built specifically for the qualifying LEC.[35] This demonstrates a misunderstanding of infrastructure "sharing." The purpose of Section 259 is to allow qualifying carriers to share infrastructure that the providing LEC has installed for its own purposes; the providing LEC is not required to be a construction company for the qualifying LEC. No additional notice beyond that already required under Section 251(c)(5) is necessary.[36]

VII. IN DEFINING "QUALIFYING CARRIERS," THE COMMISSION SHOULD IMPLEMENT CONGRESS'S INTENT TO MAXIMIZE THE AVAILABILITY OF ADVANCED SERVICES.

The Commission must not establish strict guidelines defining qualifying carriers because doing so would fundamentally undermine rural LECs' ability to bring advanced services to their customers. The commenters advocating narrow limits on qualifying carriers fail to understand several critical factors which the

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[34] *See, e.g.*, BellSouth Comments at 15; MCI Comments at 13-14; NCTA Comments at 8; PacTel Comments at 17-18.

[35] RTC Comments at 16-18.

[36] Section 251(c)(5) requires public notice of network changes by all incumbent LECs, independent of other Section 251 requirements. *See, e.g.*, 47 C.F.R. §§ 51.325, 51.327, 51.329,51.331, 51.333, 51.335.

Commission must consider.[37]

First, the purpose of the statute is to increase the availability of advanced services through the sharing of infrastructure. Thus, assertions that the determination of whether a carrier qualifies for sharing should be done at the holding company level are without merit. In GTE's case, the holding company is large, but many of the operating units serve small, rural areas. It is often not financially reasonable for these companies to install expensive infrastructure when there are so few customers in a relatively large service area. As USTA noted, the fact that an operating entity is part of a larger holding company structure "does not always translate into the economies of scale required to support advanced network capabilities."[38] A determination that an operating unit affiliated with a holding company is not entitled to share infrastructure would prevent customers from obtaining access to advanced services.

Second, the statute contemplates a comparison of economies of scale and scope between the providing LEC and the qualifying LEC; it does not articulate a particular standard which a qualifying LEC must meet. Frontier and NCTA are therefore wrong to suggest that the Commission should only allow carriers meeting the Act's definition of "rural telephone company" to take advantage of infrastructure sharing. Congress specifically defined rural telephone companies in the Act,[39] but chose not to use that term in Section 259. Rather, it intended a case-by-case comparison between the requesting LEC and the LEC receiving the

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[37] AT&T Comments, CC Docket No. 96-237, at 3-5 (filed Dec. 20, 1996); NYNEX Comments at 17-20; NCTA Comments at 3; Frontier Comments at 3-4.

[38] USTA Comments at 14.

[39] 47 U.S.C. § 153(47).

request. As GTE pointed out and other commenters confirmed, under this standard a LEC may be a qualifying LEC for some types of infrastructure and a providing LEC for other types; the two classifications are not mutually inconsistent.[40] Accordingly, while the Commission may establish a presumption that a rural telephone company lacks the requisite economies of scope or scale and therefore is a qualifying LEC, it must permit individual operating units that do not meet the statutory definition of rural telephone company to demonstrate that they are eligible to proceed under Section 259 in a particular service area.

VIII. CONCLUSION

Except for MCI, there is general consensus that successful infrastructure sharing requires only general guidelines from the Commission and that detailed regulations would hamper flexibility and cooperation. Therefore, the Commission should not adopt definitions, set pricing standards, mandate specific terms and conditions, or unduly limit the potential universe of qualifying carriers.

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[40] GTE Comments at 10-11; RTC Comments at 20-21.

Rather, the Commission should include general guidelines in its Order consistent with the recommendations discussed above and in GTE's opening Comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 1997, I caused copies of the foregoing Reply Comments of GTE to be delivered by hand to the following:

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